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In the Supreme Court of the United States

OCTOBER TERM, 1975

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known As Trust No. T509,

Petitioner,

VS.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Fourth District Court of Appeal of the State of Florida entered on July 19, 1974.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of the State of Florida is reported at 298 So.2d 443 and is

printed in Appendix A hereto. (App. 1a) The decision is a *per curiam* opinion which incorporates by reference the authority and reasoning of the same court's decision in *Town of Palm Beach* v. *Royal Palm Beach Hotel, Inc.*, also filed July 19, 1974, reported at 298 So.2d 439, and printed in Appendix B hereto. (App. 3a) The order of the Fourth District Court of Appeal denying petitioner's petition for rehearing (not reported) and the orders of the Florida Supreme Court denying petitioner's petitions for a writ of certiorari (reported at 311 So.2d 113) and for rehearing (not reported) are printed in Appendix C hereto. (App. 10a) The trial court opinion of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, is unreported and is printed in Appendix D hereto. (App. 13a) The opinion of the Florida Supreme Court in a related case, *Town of Palm Beach* v. *Gradison*, is reported at 296 So.2d 473 and is printed in Appendix E hereto. (App. 21a)

JURISDICTION

The judgment of the Fourth District Court of Appeal of the State of Florida was entered on July 19, 1974. Petitioner's petition for rehearing in that court was denied on August 28, 1974. Petitioner's petition for certiorari in the Florida Supreme Court was denied on March 14, 1975, and its petition for rehearing in that court was denied on April 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether, in a case raising federal questions in a state court, petitioner has been denied due process of law by a state court decision which applies state procedural rules and state doctrines of mootness so as to make it impossible for petitioner to obtain a final judicial determination of its federal rights in the state courts.

   A. Whether state procedural law may, consistently with federal due process, be interpreted to defeat petitioner's right to assert and protect its federal rights in the state courts.

   B. Whether state procedural rules which abridge petitioner's First Amendment right to petition the Government for a redress of grievances are consistent with federal due process.

2. Whether state procedural rules may, consistently with the federal equal protection clause, impose special burdens on petitioner in its attempt to sue a Florida municipality in the courts of Florida which are not imposed on litigants suing private parties in those courts.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

First, Fifth and Fourteenth Amendments of the United States Constitution, set forth in Appendix F. (App. 40a)

Rule 5.12, Florida Appellate Rules, set forth in Appendix F. (App. 42a)

STATEMENT OF THE CASE

Athough this action began in the state courts of Florida as a zoning lawsuit, this petition does not present any of the substantive zoning issues which originally prompted the litigation. Rather, the issues here presented for review all involve the basic question of petitioner's right to assert and protect its federal constitutional rights in an effective manner in the state courts of Florida.

Petitioner has for many years owned three substantial parcels of oceanfront property in the respondent Town of Palm Beach, Florida. For nearly 15 years prior to 1970, these properties had been zoned to permit the development of approximately 55 dwelling units per acre in buildings no more than 8 stories high. In March, 1970 the respondent Town adopted a new zoning ordinance, Ordinance 3-70, which had the effect of severely "downzoning" petitioner's properties. Under the 1970 ordinance, petitioner's largest parcel was zoned to permit no more than four single family houses per acre. Petitioner's two other, smaller parcels were zoned to permit no more than 18 units per acre in buildings no more than 3 stories high. Several miles of oceanfront property held by other owners were similarly downzoned by Ordinance 3-70.

Proceedings in the Trial Court

On July 27, 1970, petitioner filed a complaint in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County,[1] alleging, in essence, that the respondent Town's Ordinance 3-70 violated its federal due process and equal protection rights and took its property without compensation. In addition, the complaint alleged several state constitutional and statutory grounds, including an allegation that Ordinance 3-70 was adopted in violation of the Florida Government-in-the-Sunshine Law, Fla. Stat. §286.011, an act requiring public bodies to deliberate in public. Several other property owners filed similar actions at about the same time.

[1] In addition to the Town of Palm Beach, the other respondents are Claude D. Reese, James E. Hollingsworth, George G. Matthews, Robert M. Grace, Edgar H. Latham, Jr., and Yvelyne de M. Marix, constituting the Town Council of the Town of Palm Beach, Florida, and Hugh D. Bruce, as Town Clerk of the Town of Palm Beach, Florida.

The Sunshine Law claim was consolidated with similar claims of other property owners and severed for separate trial. On November 30, 1971, the trial court ruled in favor of the respondent Town on that issue. *IDS Properties, Inc.* v. *Town of Palm Beach,* No. 70C 1008 (not reported). An interlocutory appeal of this decision was taken by another property owner. Petitioner did not join in the interlocutory appeal but rather elected to go forward with the trial on the federal and state constitutional issues.

On April 27, 1972, the Florida trial court, after hearing the evidence, found that petitioner had sustained the heavy burden of proving its constitutional claims and held that Ordinance 3-70 was invalid as it applied to petitioner's three parcels. The trial court went further, however, and, based on the evidence before it, found that any attempt by the Town to limit the use of petitioner's property to less than 40 units per acre and 5-story buildings would also violate petitioner's federal constitutional rights. The trial court decree expressly directed the Town to rezone petitioner's parcels to a classification that would permit such development and prohibited rezoning to any more restrictive classification. (App. 20a)

Proceedings in the Florida District Court of Appeal and Supreme Court

The respondent Town appealed the aforesaid order. Under Rule 5.12, Florida Appellate Rules (App. 42a), this appeal by a political subdivision of the State perfected an automatic stay of the trial court decree. Petitioner filed a cross-appeal on the Sunshine Law issue.

On May 30, 1973, having consolidated petitioner's cross-appeal with the earlier-filed interlocutory appeal on the Sunshine Law issue, Florida's Fourth District Court of Appeal reversed the trial court and declared Ordinance 3-70 void for violation of the Sunshine Law. *IDS Properties, Inc.* v. *Town of Palm Beach,* 279 So.2d 353. The Town appealed this Sunshine Law decision to the Florida Supreme Court, again invoking the Rule 5.12 supersedeas.

At this juncture, the Town, acting under the protection of the automatic stay granted by the Florida Appellate Rules, adopted a new zoning ordinance, Ordinance 2-74, which purported again to impose on petitioner's parcels essentially the same single family and low density zoning which the trial court had found violated petitioner's federal constitutional rights.[2]

On May 1, 1974, the Florida Supreme Court sustained the District Court of Appeal on the Sunshine Law issue and held Ordinance 3-70 to be void for violation of that law. *Town of Palm Beach* v. *Gradison,* 296 So.2d 473. (App. 21a)

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[2] In contrast to the floor of 40 units per acre established by the trial court decree as the limit of constitutionally permissible regulation, the ordinance permits a maximum of two single family houses per acre on petitioner's largest parcel; with special approvals, up to 10 units per acre would be permitted. On petitioner's other parcels, the ordinance permits a maximum of 16 units per acre.

On July 19, 1974, Florida's Fourth District Court of Appeal filed its opinion in the Town's appeal on the federal constitutional issues (App. 1a) and held that the Town's appeal had been mooted by the Town's adoption of Ordinance 2-74 and the Sunshine Law decision voiding Ordinance 3-70 on state procedural grounds. Having held the Town's appeal from petitioner's favorable trial court judgment moot, the District Court of Appeal in an incomprehensible ruling, *reversed* the trial court judgment establishing petitioner's federal constitutional rights. It is this decision which petitioner seeks to have reviewed by this Court.

The federal issues raised in this petition first arose with the filing of the District Court of Appeal's decision on July 19, 1974. In response to that decision, petitioner filed its "Supplement to Appellee's Petition for Rehearing and Additional Suggestion to Certify Decision to the Supreme Court," which dealt solely with the federal constitutional issues here sought to be raised. A copy is printed as Appendix G. hereto. (App. 43a) The following statement of the federal issue as presented to the Fourth District Court of Appeal is quoted from that petition:

> "If Rule 5.12 F.A.R. operates to permit a municipality to defeat the rights of a successful litigant by taking actions contrary to the Final Decree during the pendency of an appeal, is Rule 5.12 F.A.R. unconstitutional under the United States and Florida Constitutions as denying such litigant due process and equal protection?" (App. 48a)

The Florida Fourth District Court of Appeal denied petitioner's petition for rehearing without making reference to the feedral rights asserted therein. (App. 10a) Petitioner then filed its petition for a writ of certiorari in

the Supreme Court of Florida. Although denial of federal constitutional rights is not a basis for such a petition under Florida law, Rule 4.5c, Florida Appellate Rules, petitioner did raise and argue the issue. The relevant portions of the petition and the brief are printed as Appendix H hereto. (App. 49a) The Florida Supreme Court denied petitioner's petition without referring to the federal constitutional issues thus raised. (App. 11a) Petitioner's petition for rehearing was also denied without opinion. (App. 12a)

REASONS FOR GRANTING THE WRIT

This case presents basic questions concerning the right of a property owner effectively to assert and protect its federal constitutional rights in the courts of the State of Florida. A Florida trial court has found that any attempt to zone petitioner's property for less than 40 units to the acre violates petitioner's federal constitutional rights because such zoning is

> ". . . far too drastic for the needs of the Town as shown by this record, particularly when considered in juxtaposition with the confiscatory nature of the economic impact on this property, and the demonstrated absence of the need for such restrictive regulations to serve the general welfare." (App. 20a)

No Florida court has ever questioned the validity of this finding and conclusion. Nevertheless, the petitioner has been denied the benefits of the April 27, 1972 trial court decree and has been precluded from effectively asserting its federal rights by the Florida Fourth District Court of Appeal's interpretation of state procedural rules and precedents in its July 19, 1974 decision.

Review in this Court is appropriate not only because of the basic constitutional questions involved and the severe economic impact on petitioner of the state court's refusal to adjudicate petitioner's federal claim [3] but also because of the implications for the federal judiciary if state courts are not required to afford effective protection for the federal constitutional rights upon which every zoning case

[3] The trial court found as fact that petitioner had suffered a loss of close to $6 million by the adoption of the unconstitutional ordinance.

is founded. The nature of zoning disputes generally makes the state courts a more appropriate forum for such litigation. However, if those courts refuse to provide effective remedies for violations of federal rights, aggrieved property owners will increasingly find themselves compelled to bring their zoning litigation to the federal courts.[4]

I.

THE COURTS OF FLORIDA HAVE VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE, HAVE REFUSED TO PROVIDE AN EFFECTIVE STATE FORUM FOR THE ASSERTION OF FEDERAL RIGHTS AND HAVE DENIED PETITIONER'S RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES BY REFUSING TO ADJUDICATE ITS FEDERAL CONSTITUTIONAL CLAIMS.

The immediate effect of the Florida decision is to deprive petitioner of its judicially established federal constitutional rights without affording it a hearing on the merits of its federal claims.

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[4] The sort of procedural delaying tactics which threaten to defeat petitioner's federal rights in this case are not unique to the State of Florida. For an especially glaring and instructive example of how the federal constitutional rights of a property owner can be abused by a state court system which refuses to offer effective remedies against confiscatory municipal zoning regulations, see a series of reported decisions involving the Davlee Construction Corp. and the Town of Huntington, New York: *Davlee Construction Corp.* v. *Brooks,* 21 Misc.2d 137, 188 N.Y.S.2d 847 (Sup. Ct. 1959); *Davlee Construction Corp.* v. *Brooks,* 26 Misc.2d 240, 213 N.Y.S.2d 593 (Sup. Ct. 1960); *Davlee Construction Corp.* v. *Town of Huntington,* 33 Misc.2d 431, 223 N.Y.S.2d 376 (Sup. Ct. 1961), *aff'd as modified,* 16 A.D.2d 974, 230 N.Y.S.2d 506 (1962); *Davlee Construction Corp.* v. *Horn,* 16 A.D.2d 973, 230 N.Y.S.2d 504 (1962).

The practical, long-term effect of the decision is to foreclose petitioner from ever obtaining effective relief in the Florida courts for the already adjudged denial of a federal right. Under the District Court of Appeal's decision, petitioner is left with nothing but the right to relitigate, and relitigate again and again, the same federal issues which it has once litigated and won and which have never yet been reviewed by any Florida appellate court.

Under the Fourth District Court of Appeal's interpretation of Florida procedural rules and precedents, so long as the Town of Palm Beach wishes to go on appealing its trial court defeats and using the automatic supersedeas and the time thus obtained to adopt ordinance after ordinance, petitioner will never be able to secure a final state court judgment prohibiting the Town from adopting ordinances which do not meet the test of federal constitutional validity. While this process of relitigation goes on *ad infinitum,* petitioner's right to develop its property in the manner already adjudged to be its right under the federal constitution is held in abeyance.

In one of its early opinions giving content to the concept of "due process of law," this Court said:

> "Recognizing the difficulty of defining, with exactness, the phrase 'due process of law,' it is certain that these words imply conformity with natural and inherent principles of justice. . . ." *Holden* v. *Hardy,* 169 U.S. 366, 390 (1898).

Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 161 (1951), said simply that "Fairness of procedure is 'due process in the primary sense.'"

Brinkerhoff-Faris Co. v. *Hill,* 281 U.S. 673 (1930) brought to this Court a state court's refusal to adjudicate

federal rights comparable to that involved here. In that case, the plaintiff followed established state procedures for challenging a state tax as violative of the equal protection clause of the federal constitution. When the case reached the Missouri Supreme Court, that court overruled several of its earlier decisions and held that the plaintiff had followed the wrong procedures and that it was now too late for it to follow what the court determined to be the correct procedure. On writ of certiorari to the Missouri Supreme Court, Mr. Justice Brandeis, speaking for a unanimous Court, reaffirmed the principle that the federal guarantee of due process extends to the judicial branch of state government, *Id.* at 680, and went on to hold:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

If this Court declines to review and reverse the decision of the Florida court, petitioner will have spent six years and hundreds of thousands of dollars in court costs, expert witness fees and legal fees challenging the ordinance adopted in 1970. Petitioner will have established that that ordinance was unconstitutional and that any ordinance which limits the development of its property to less than 40 units to the acre is equally unconstitutional. But despite that, petitioner will find itself back in the trial courts of Florida challenging a new ordinance which violates its rights in the same way as did the original rezoning. No matter how speedily the Florida trial court acts, petitioner will be faced with the prospect of another appeal by the Town. During that appeal, the Town would again be free to adopt yet another new ordinance and start the process all over

again. Petitioner's property, which has been rendered useless and unproductive for the past six years, will remain so indefinitely. State procedures which permit such results cannot stand in the face of the federal guarantee of due process.

These fundamental considerations of due process take on added importance in this case because the denial of due process is so extreme as to amount to a refusal of the state courts to adjudicate a federal claim and protect a federal right.

This Court has frequently recognized the obligation of the courts of the various states to provide an effective forum for the protection of federal rights. Mr. Justice Frankfurter summarized much of this law for the Court in *Angel* v. *Bullington*, 330 U.S. 183, 188 (1947):

> "Speaking for a unanimous court, Mr. Justice Brandeis thus expressed the subordination to the requirements of the Constitution of the power of a state to withdraw jurisdiction from its courts: 'The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.' . . . This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Of particular relevance to this case are several decisions of this Court indicating that neither state concepts of "mootness" nor general rules regarding the application of "changed law" on appeals can justify closing state

courts to federal claims or denying basic justice and due process to litigants.

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964), involved the question of whether a federal claim could be defeated under state law rules concerning mootness. In that case, this Court held that when a plaintiff is asserting federal rights in a state court,

> ". . . the question of mootness is itself a question of federal law upon which we must pronounce final judgment." *Id.* at 304.

This Court went on to hold that the appeal there had not been mooted since "the federal issues remain of operative importance to the parties. . . ." *Id.* at 306.

In the instant case, the federal issues originally raised remain unresolved and of unquestioned importance to the parties. The basic issue from the beginning has been whether the Town of Palm Beach may, consistently with petitioner's federal constitutional rights, downzone petitioner's properties so as to prohibit the development of condominium and apartment structures. The Florida trial court held that it could not. The District Court of Appeal, while refusing to consider the merits of that question, reversed the trial court decree on the basis that the controversy had been mooted by the Town's adoption, under the protection of a state-oriented automatic supersedeas, of an ordinance which continued to prohibit such development. Whatever the right of Florida courts to abdicate the judicial function to legislative contrivance when only state law questions are involved, they may not withdraw their protection from litigants asserting federal rights.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953), the defendant alleged the case was moot, asserting that it

had voluntarily stopped the objectionable practice which had given rise to the lawsuit. This Court held the case was not moot, observing that without an affirmative adjudication settling the controversy, the defendant was ". . . free to return to his old ways. . . ." In so holding, this Court quoted from its earlier opinion in *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952):

> "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption."

In the instant case, there is nothing like a "protestation of repentance and reform" and the "probability of resumption" has become the fact of resumption. Here the Town has brazenly adopted another ordinance which has all the same vices as the ordinance which the trial court found violated petitioner's federal rights. Nor is there any way, under the decision of the Florida Fourth District Court of Appeal, for petitioner to stop the Town from continuing the reenactment process over and over again until petitioner is no longer willing or able to continue the battle to vindicate its federal rights.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 514 (1911), this Court recognized the basic inequity of such a situation and held that the mootness doctrine is applicable only where, pending appeal, something occurs without the fault of the defendant which renders it impossible, should the decision be for plaintiff, to grant effective relief. In refusing to regard an issue as moot simply because an order of the Commerce Commission giving rise to the dispute had expired, this Court said:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review . . ." *Id.* at 515.

So here, unless petitioner's rights to the zoning restrictions decreed to be reasonable by the final judgment of the Florida trial court are finally and clearly settled on appeal to the Florida appellate courts, the respondent Town will be free to adopt and repeal ordinance after ordinance, each in a slightly different manner thwarting any reasonable use of petitioner's properties.

The mootness issue was raised in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), a zoning case recently decided by this Court. This Court rejected the mootness claim, recognizing that the continuing impact of the ordinance, even if the precise impact could not be determined, gave the appeal continuing vitality. Similarly here, whether it is a 1970 or a 1974 ordinance which prohibits petitioner from makng what it has alleged and proved to be a constitutionally reasonable use of its property, the issue is the same and petitioner has a right to a final determination of its constitutional rights. If the courts of Florida permit Florida municipalities to send the petitioner back to the starting line by the simple device of repeatedly readopting zoning measures which have previously been determined to be unconstitutional, the guarantees of the Bill of Rights cease to have any meaning in Florida zoning litigation.

The Florida Fourth District Court of Appeal relied on the general rule that an appellate court must apply the law in effect when the appeal is decided. (App. 5a) That rule provides no sufficient basis for refusing to adjudicate

a federal claim. In *Bradley* v. *School Bd. of City of Richmond,* 416 U.S. 696 (1974), this Court recognized that the general rule must give way where necessary "to prevent manifest injustice." *Id.* at 716. Certainly, where the "injustice" rises to the level of a denial of federal due process, the general rule must give way. In *Bradley, supra.* this Court held that the question of whether a change in law pending appeal should be considered must be decided in light of (a) the nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change of law upon those rights. *Id.* at 717.

In this case, the right involved is the right to own and use property free of unconstitutional governmental interference. The impact of considering the change in law is to deny petitioner that right for at least several more years. But perhaps the most critical consideration relates to the nature of the parties. Here, the party which will benefit from the "change of law" is the government entity which created the change and which, under the decision of the state court herein, has unfettered power to create one such change after another.

The manifest injustice of finding an appeal to be mooted by a change of law when one of the parties has absolute discretion to change the law in question, seems self-evident and has been recognized by several state courts when confronted with similar municipal attempts to undermine the judicial protection of private rights from legislative encroachment. In *First National Bank of Skokie* v. *Village of Skokie,* 85 Ill. App.2d 326, 337, 229 N.E.2d 378, 384 (1967), the Illinois court refused to consider a new ordinance under such circumstances, saying:

> "To hold otherwise would severely weaken the judicial process when it is properly invoked to provide equitable remedy in zoning cases. By repeated eleventh-

hour amendments to the zoning ordinance (or thirteenth-hour, as in this case), a resourceful village board could prolong litigation endlessly and utterly deprive an equity petitioner of any meaningful moment at the Chancellor's ear."

In *State ex rel. Humble Oil & Refining Co.* v. *Wahner,* 25 Wis.2d 1, 14, 15, 130 N.W.2d 304, 311, 312 (1964), the Wisconsin court said:

> "Equitable considerations bar the town from giving Humble such a fast shuffle at this late stage in the game. . . .
>
> • • •
>
> ". . . If the town's contention is upheld it would be tantamount to approving the proposition that every time a party came close to successfully challenging a town and its zoning board on its zoning actions, its gains could be legislated away by the enactment of an amendment to the ordinance. Equitable considerations . . . bar this court from giving any effect to the March 4, 1963 amendment."

By the decision of this case, the Fourth District Court of Appeal has abandoned petitioner to the untrammeled legislative whim of Florida municipalities and has effectively closed the doors of Florida's courts to the petitioner. This Court has recently considered effective access to the courts as an element of due process. In *Johnson* v. *Avery,* 393 U.S. 483 (1968), this Court held invalid a state prison rule that impeded prisoners attempting to assert habeas corpus claims, saying, ". . . it is fundamental that access of prisoners to the courts for the purpose of asserting their complaints may not be denied or obstructed." *Id.* at 485. In *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), the *Avery* holding was extended to prisoners' civil rights actions. This Court said:

> "The right of access to the courts, upon which Avery was premised, is founded on the Due Process Clause

> and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579.

Here, the state court's decision defeats and obstructs petitioner's efforts to have its federal and state constitutional claims finally determined by the courts of Florida in a fashion as effective as the denial of legal assistance condemned in *Avery* and *Wolff.*

When, as here, a denial of due process prevents effective access to the courts, the result is a violation of the independent First Amendment right to petition the Government for a redress of grievances. This Court has expressly held that:

> "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed one aspect of the right of petition." *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972).

In *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1963), this Court held that a state may use *neither direct nor indirect* means to bar citizens "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.* at 7.

II.

PETITIONER HAS BEEN DENIED THE EQUAL PROTECTION OF THE LAWS BY THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL WHICH HAS THE EFFECT OF DISCRIMINATING AGAINST PARTIES WHO SEEK TO LITIGATE AGAINST FLORIDA MUNICIPALITIES.

The decision of the Florida Fourth District Court of Appeal accords special rights to municipalities involved in

litigation which are not accorded to other parties. For that reason, the decision imposes disadvantages upon petitioner in its attempt to sue the respondent Town which would not be imposed upon litigants suing private defendants.

The law of Florida generally applicable to supersedeas is that the trial court may, in its discretion, grant a supersedeas or stay, but only upon motion of the appellant and upon appellant giving a good and sufficient bond. Rules 5.1. *et seq.*, Florida Appellate Rules. If, upon a hearing on the appellant's motion, the appellee shows that the effect of the supersedeas would be to permit the appellant to do the things enjoined by the final decree, that alone is sufficient to warrant denial of the supersedeas. *Powell* v. *Florida Land & Improvement Co.*, 41 Fla. 494, 26 So. 700 (1899); *Hathaway* v. *Munroe*, 97 Fla. 28, 119 So. 149, 150 (1929).

The Supreme Court of Florida has held that the purpose of a supersedeas is "to preserve the subject of the litigation so that the appellate jurisdiction may be effective . . .," *Willey* v. *Hoggson Corp.*, 89 Fla. 446, 450, 105 So. 126, 128 (1925), and that where ". . . a supersedeas would in effect deny the main relief sought before a full hearing is had . . .," the supersedeas should be denied. *Hathaway* v. *Munroe, supra*, 97 Fla. 33, 119 So. 150.

In the case of a municipal appellant, however, the rules are different. The trial court has no discretion whatever to deny a supersedeas. The filing of a notice of appeal automatically perfects the supersedeas. Rule 5.12(1), Florida Appellate Rules. (App. 42a) No supersedeas bond need be given by the municipality unless it is expressly required by the court on motion of the appellee for good cause shown. Rule 5.12(2), Florida Appellate Rules. (App. 42a) Of

course, in an action such as this, a bond offers no protection to the appellee. The only effective protection is a denial of supersedeas or a limitation upon it to prohibit the municipality from violating the trial court decree pending appeal. That, according to the District Court of Appeal's decision in this case, is not available to an appellee in an appeal taken by a Florida municipality.

In both the Florida Fourth District Court of Appeal and the Florida Supreme Court, petitioner argued that in order to avoid this unconstitutional discrimination between litigants in cases involving municipalities and litigants in other cases, the Rule 5.12 automatic supersedeas should be interpreted to stay only the mandatory portion of the trial court's decree (which directed that petitioner's property be rezoned to a classification permitting 40 units to the acre) but that it not be effective to prevent the operation of the prohibitory aspect of the trial court's order (which prohibited the respondent Town from rezoning to any classification more restrictive than 40 units to the acre). Such an interpretation would have placed petitioner on a more equal footing with other appellees involved in Florida litigation. Despite the existence of precedent from the Third District Court of Appeal in Florida, *City of Miami* v. *Cuban Vill-age Co., Inc.*, 143 So.2d 69 (3rd Fla. D.C.A. 1962), and *City of Miami Beach* v. *Lansburgh*, 217 So.2d 348, 349, 350 (3rd Fla. D.C.A. 1969), the Fourth District Court of Appeal refused to so interpret Rule 5.12 and the Supreme Court of Florida refused to review the decision of the Fourth District Court.

CONCLUSION

For the foregoing reasons, we pray that the Petition may be granted.

Respectfully submitted,

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